No. 18-6210

In The Supreme Court of the United States

GERALD P. MITCHELL,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Wisconsin

BRIEF OF *AMICUS CURIAE* CALIFORNIA DUI LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. THE IMPLIED CONSENT LAWS VIOLATE THE UNCONSTITUTIONAL CONDITIONS DOCTRINE.	4
II. THERE IS NO NEED FOR STATES TO REQUIRE THE FORFEITURE OF DRIVERS' FOURTH AMENDMENT RIGHTS.	11
CONCLUSION	13

TABLE OF AUTHORITIES

Page

CASES

Bagley v. Washington Township Hospital Dist., 65 Cal.2d 499 (1966) 10

Bumper v. N.C., 391 U.S. 543 (1968) 9

Edelman v. Jordan, 415 U.S. 651 (1974) 10

Frost v. R.R. Comm'n of State of Cal., 271 U.S. 583 (1926) 4, 5, 6, 8

Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595 (2013) 6

Missouri v. McNeely, 569 U.S. 141 (2013) 2, 11, 12

Perry v. Sindermann, 408 U.S. 593 (1972) 6

Schmerber v. Cal., 384 U.S. 757 (1966) 14

Shapiro v. Thompson, 394 U.S. 618 (1969) 10

Speiser v. Randall, 357 U.S. 513 (1958) 6, 7

U.S. v. Scott, 450 F.3d 863 (9th Cir. 2006) 7, 8

CONSTITUTIONAL PROVISIONS

U.S. Constitution, amend. IV ..... *passim*

U.S. Constitution, amend. V 8

U.S. Constitution, amend. XIV 6

STATUTES

Cal. Pen. Code §1526(b) 11

Cal. Veh. Code §13384 8

TABLE OF AUTHORITIES – Continued

Page

Cal. Veh. Code §13388 8

Cal. Veh. Code §23137 9

Cal. Veh. Code §23157 9

Cal. Veh. Code §23538 8

Cal. Veh. Code §23577 8

Cal. Veh. Code §23612 8

OTHER AUTHORITIES

Bergreen, *Faster Warrant System Hailed*, Salt Lake Tribune, Dec. 26, 2008, p. B1, col. 1 12

California Courts, The Judicial Branch, *Electronic On-Call Warrants – San Bernardino Superior Court*, http://www.courts.ca.gov/27655.htm 12

Homer, *The Odyssey*, Book XII, The Harvard Classics (1937 ed.) pp. 163-164 5

Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413 (1989) 9

Lindsey Erin Kroskob, *Police Take First Forced Blood Draw*, Wyoming Tribune-Eagle (August 19, 2011) 12

INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae California DUI Lawyers Association (CDLA) respectfully requests to file the attached *Amicus Curiae* Brief in support of the Petitioner, Gerald P. Mitchell.

The Court's decision in this matter will have a significant impact on driving under the influence litigation in the State of California. CDLA seeks to make this Court aware of CDLA's views. CDLA has been an *amicus* in some of the leading DUI cases in California. See *People v. McNeal*, 46 Cal.4th 1183, 96 Cal.Rptr.3d 261 (2009); *People v. Vangelder*, 58 Cal.4th 1, 164 Cal.Rptr.3d 522 (2013); *People v. Harris*, 234 Cal.App.4th 671, 184 Cal.Rptr.3d 198 (2015). CDLA has been an *amicus* in the California Supreme Court in the Confrontation Clause related case of *People v. Dungo*, 55 Cal.4th 608, 147 Cal.Rptr.3d 527 (2012), and in the Confrontation Clause related case in this Court in the case of *Williams v. Illinois*, 567 U.S. 50, 132 S. Ct. 2221 (2012). CDLA is also an *amicus* in the pending California Supreme Court case of *People v. Arredondo* (Case Number S233582). One of the issues in *Arredondo* is nearly identical to the issue presented in this case. The Court's determination here will have a significant impact on the outcome of *Arredondo*.

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[1] Pursuant to Rule 37.6, counsel for *amicus* state that no counsel for a party authored this brief in whole or in part and no person, other than *amicus*, its members, or its counsel made a monetary contribution to the preparation of this brief. The parties have provided CDLA with written consent to the filing of an *amicus* brief.

CDLA is a non-profit organization and has well over three hundred members throughout California. Collectively, CDLA members likely represent thousands of citizens each year who are accused of driving under the influence. As a representative of the California DUI defense bar, CDLA's members have vast experience in DUI Fourth Amendment litigation. Much of this experience pertains to warrantless searches and seizures of blood samples pursuant to California's implied consent statute, which is quite similar to the Wisconsin implied consent statute at issue in this case. CDLA respectfully maintains that its brief will assist the Court in deciding this matter.

SUMMARY OF ARGUMENT

Implied consent laws impose an unconstitutional condition on motorists. If a person wants to drive on a highway, implied consent laws deem that they have consented to a warrantless seizure of their blood, breath, or in some cases urine, if they are arrested for driving under the influence. If the driver becomes unconscious, implied consent laws like the Wisconsin statute at issue here, deem that they have consented to a taking of their blood without a warrant. But this Court, in *Missouri v. McNeely*, 569 U.S. 141 (2013), held that such a taking is not permitted absent some exception to the warrant requirement. Because implied consent laws are ubiquitous, and because of the number of people these laws reach, implied consent laws have

resulted in one of the greatest takings of Fourth Amendment rights in American history.

State governments have a monopoly on the issuance of driver's licenses, and own most of the roads on which people travel. For millions of people, driving is a necessity. This is particularly true in a state like California where rapid transit is often not readily available. Since for most persons driving is a must, monopolist state governments can dictate the terms for driving. And most people have no real choice but to accept those terms. That is because the choice is one between waiving their Fourth Amendment rights, and abandoning the opportunity to drive. The latter option almost ensures sacrificing the prospect of leading a normal modern life.

Those who acquiesce (which is essentially everyone) are simply yielding to the power of the government. The choice is illusory, unconstitutional, and it is unnecessary. If the police want to obtain a blood sample from a suspected impaired driver, and if for some reason they cannot obtain consent from that driver, the police may seek a warrant. And if the police cannot readily obtain a warrant (which now appears to be an increasingly unlikely scenario), then the blood sample may be taken pursuant to the exigent circumstances doctrine. In today's environment, those provisions of implied consent laws that authorize the warrantless search and seizure of a blood sample are both unneeded, and unconstitutional.

ARGUMENT

I. THE IMPLIED CONSENT LAWS VIOLATE THE UNCONSTITUTIONAL CONDITIONS DOCTRINE.

For many people in America, and for nearly all people of age in California, driving is a *must*. Driving is a necessity for those who have to travel any distance to get to work, pick the kids up from school, or simply complete the errands of modern life.

Because the need to drive is critical in today's world, the government can apply massive torque to those who want to drive the public highways. Almost all will tap to the government's demand that if they want to drive, they must consent to a waiver of their Fourth Amendment rights pursuant to implied consent laws.

The unconstitutional conditions doctrine prohibits the government from requiring the relinquishment of a constitutional right in order to secure a government benefit. The reason for the doctrine is to guard against efforts by the government to negotiate away constitutional rights, by offering needed benefits in exchange for the abandonment of those constitutional rights. The Court in *Frost v. Railroad Commission of State of Cal.*, 271 U.S. 583, 593-94, 46 S. Ct. 605 (1926), addressed this disquieting possibility by stating:

> If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United

States may thus be manipulated out of existence.

This manipulation is precisely what the implied consent laws accomplish. In *Frost*, the California legislature passed an Act (the Auto Stage and Truck Transportation Act of California) that required, as a condition of operating on the highways, that private carriers also become public carriers. This Court observed that on its surface, the Act seemed somewhat benign. The private carriers could just accept or reject the Act's conditions. The Court noted that in reality, there was no real choice for the private carriers. If the private carriers refused the state's condition to also become public carriers, the private carriers were out of business. On the other hand, if the private carriers accepted the government's condition, the record apparently indicated that the carriers could not economically survive.

In the Court's words, there was no alternative "except a choice between the rock and the whirlpool."[2] *Frost v. Railroad Commission of State of Cal.*, *supra*, 271 U.S. at 593. The Court found the Act

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[2] The Court's reference to *the rock and the whirlpool* appears to refer to a dilemma faced by sailors in Homer's epic, The Odyssey. The sailors had to pass a narrow strait, which was anchored on either side of the passage by a sea monster. One monster, Scylla, was a six-headed beast that resided in a cave inside a *rock*. On the other side of the strait was Charybdis, a sea monster that created treacherous *whirlpools*. Thus, there was no good option as to where to transit the strait. The choice was between the *rock and the whirlpool*. Homer, *The Odyssey*, Book XII, The Harvard Classics (1937 ed.) pp. 163-164.

unconstitutional as a violation of the due process clause of the Fourteenth Amendment. The Court held that while a state may have the power to completely deny a given privilege, it may not place upon the privilege conditions that "require the relinquishment of constitutional rights." *Frost v. Railroad Commission of State of Cal.*, 271 U.S. at 594.

More recently, in *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 606, 133 S. Ct. 2586 (2013), this Court reached a similar conclusion. The *Koontz* opinion held that "the unconstitutional conditions doctrine forbids burdening the Constitution's enumerated rights by coercively withholding benefits from those who exercise them." See also *Perry v. Sindermann*, 408 U.S. 593, 597, 92 S. Ct. 2694 (1972) (Holding that the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests. . . .").

Analogous governmental conditions were considered by the Court in *Speiser v. Randall*, 357 U.S. 513, 78 S. Ct. 1332 (1958). In that case, California demanded the relinquishment of a federal constitutional right in exchange for a government benefit. The benefit – a tax exemption – was denied to those veterans who refused to sign a declaration that relinquished their right to free speech. The Court found that the withholding of the benefit was effectively a punishment for exercising a constitutional right. "To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for such

speech. . . ." *Speiser v. Randall, supra*, 357 U.S. at 518. The coercive effect of the condition was clear. The Court wrote that "the denial of a tax exemption for engaging in certain speech necessarily will have the effect of coercing the claimants to refrain from the proscribed speech." *Speiser v. Randall, supra*, 357 U.S. at 519.[3]

The implied consent laws present a similar scenario. The implied condition of forfeiting one's Fourth Amendment right against a warrantless search in order to drive has the same coercive effect. The implied consent laws require acceptance of this unconstitutional implied condition.

The court in *U.S. v. Scott*, 450 F.3d 863, 866-67 (9th Cir. 2006) discussed what can happen when a government monopoly is permitted to give benefits only in exchange for the relinquishment of constitutional rights. The court wrote:

> Government is a monopoly provider of countless services. . . . Giving the government free rein to grant conditional benefits creates the risk that the government will abuse its power by attaching strings strategically, striking lopsided deals and gradually eroding constitutional protections.

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[3] The Court's ultimate decision rested on the fact that there were no due process procedural safeguards in place to ensure that the exemption was denied only to those who engaged in unprotected speech.

The *Scott* court's prediction, like the *Frost* Court's fear, has come to fruition. In California, not only did the legislature enact an implied consent law similar to Wisconsin's, they later passed a law that *demands* a written waiver. Vehicle Code section 13384 provides that the department of motor vehicles *shall not* issue a driver's license *unless* the applicant gives written consent that, upon arrest for driving under the influence, they will submit to a chemical test without a warrant. See Cal. Veh. Code §13384. The statutory demand for a constitutional waiver is indeed one of the perils about which the court in *U.S. v. Scott*, *supra*, had warned.

The implied consent law has also abraded an arrestee's Fifth Amendment right to have a lawyer present during questioning. In California, if a person refuses to submit to a chemical test, and is convicted of driving under the influence, they can suffer additional incarceration. See Cal. Veh. Code §§23577 and 23538. Despite the potential ramifications of the arrestee's response to the officer's request for chemical testing, California's implied consent law *prohibits* drivers from first consulting a lawyer. See Cal. Veh. Code §23612(a)(4).

Further proof of the lopsidedness of the implied consent deal is that in the recent past, thousands of drivers have provided written consent pursuant to *non-existent statutes*. For several years, and up until at least mid-2017, driver's license renewal applicants in California were required to sign a form stating that they consent to the testing provisions contained in Vehicle Code sections 13388 and 23612. In fact, the

renewal forms had applicants agree to testing in accordance with Vehicle Code section 23137, which has been repealed, and Vehicle Code section 23157, which was replaced long ago.[4] (See CDLA *Amicus* Brief and Exhibit "A" attached thereto, filed in the California Supreme Court in *People v. Arredondo*, Case Number S233582.) It appears that for several years, possibly every driver who renewed their license in California had agreed to be bound by non-existent statutes. This reveals the enormous weight of the government's leverage. The need to drive has propelled these applicants to agree to whatever conditions the government has imposed. The end result is that implied "consent" in California is not what it purports to be. In fact it cannot be consent at all, because it is "instinct with coercion." *Bumper v. North Carolina*, 391 U.S. 543, 550, 88 S. Ct. 1788 (1968).

As one legal commentator wrote, where a constitutional right "functions to preserve spheres of autonomy . . . [u]nconstitutional conditions doctrine protects that [sphere] by preventing governmental end-runs around the barriers to direct commands." Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413, 1492 (1989). It is hard to imagine a *sphere*

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[4] Vehicle Code section 23137 was repealed in 1999. (See §§23137 to 23139. Repealed by Stats. 1998, c. 118 (S.B.1186), §§11.11 to 13, operative July 1, 1999.) Section 23157 was renumbered in 1999. (See §23157. Renumbered Vehicle Code §23612 by Stats. 1999, c. 22 (S.B.24), §18.4, eff. May 26, 1999, operative July 1, 1999.)

of autonomy more worthy of the doctrine's protection than one's body.

Implied consent laws have also impermissibly forced the choice between two fundamental constitutional rights – the right against unreasonable searches and seizures and the right to travel. This Court has recognized a federal constitutional right to travel. The Court held that the right may not be unreasonably burdened or restricted. In *Shapiro v. Thompson*, 394 U.S. 618, 629, 89 S. Ct. 1322 (1969), the Court wrote:

> This Court long ago recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement.

Id. (overruled on other grounds by *Edelman v. Jordan*, 415 U.S. 651, 94 S. Ct. 1347 (1974)).

The California Supreme Court has held that when conditioning the receipt of a benefit upon the waiver of a constitutional right, the "government bears a heavy burden of demonstrating the practical necessity for the limitation." *Bagley v. Washington Township Hospital Dist.*, 65 Cal.2d 499, 505 (1966). And as discussed below, that heavy burden is not met by the implied consent law because there is no practical necessity for the law's conditions.

II. THERE IS NO NEED FOR STATES TO REQUIRE THE FORFEITURE OF DRIVERS' FOURTH AMENDMENT RIGHTS.

There is no need for the implied consent laws to serve as an exception to the warrant requirement. The already existing consent exception to the Fourth Amendment's warrant requirement routinely applies to searches of arrested persons' blood. Indeed, whether told of the implied consent statute's mandates or not, in CDLA's experience, most do not refuse an officer's request that they take a blood test.

But even if an arrested driver does not consent to a blood test, technological advancements now make obtaining warrants in the field a viable option. See Cal. Pen. Code §1526(b); see also *Missouri v. McNeely*, 569 U.S. 141, 154, fn. 4, 133 S. Ct. 1552 (2013) (Noting that in the majority of states, officers may now apply for warrants via email, telephone, video conferencing, and radio communication).

As for electronic warrants, the process in California has received positive reports. A review of the procedure and experience with electronic warrants issued by the San Bernardino County Superior Court is described on the California Courts website page as follows:

> Judicial review is provided by a standard browser application that can run on an iPad, or other mobile device. Judges can be notified of a warrant for processing by telephone, text message, or e-mail. . . . The response from

> judges and law enforcement has been very positive.

See California Courts, The Judicial Branch, *Electronic On-Call Warrants – San Bernardino Superior Court*, http://www.courts.ca.gov/27655.htm. (Noting also that several other Superior Courts in California use similar processes).

CDLA is also aware of reports of successful electronic warrant programs in other states. For example, the Chief of Police in Cheyenne, Wyoming indicated that telephonic warrants routinely take less than five minutes to obtain. Lindsey Erin Kroskob, *Police Take First Forced Blood Draw*, Wyoming Tribune-Eagle (August 19, 2011). And in Utah, the Salt Lake Tribune reported that an e-warrant for a blood draw in a driving under the influence investigation was obtained after only five minutes. Bergreen, *Faster Warrant System Hailed*, Salt Lake Tribune, Dec. 26, 2008, p. B1, col. 1.

Finally, if law enforcement is faced with a situation in which a warrant cannot be obtained in the field without substantially impairing the search, the exigent circumstances exception would apply. This finding is consistent with recent precedent. In *McNeely*, the Court wrote: "In those drunk-driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so." *Missouri v. McNeely*, *supra*, 569 U.S. at 152. It follows that if this is not possible, exigency would justify the search.

Either way, in today's world, there is no compelling need for the implied consent laws to serve as an exception to the warrant requirement.

CONCLUSION

The Fourth Amendment protects individuals against unreasonable searches and seizures by the government. The Amendment specifies that its protection covers things like a person's house, papers, and effects. But the first protection the Fourth Amendment provides – *the very first thing it guards against* – is unreasonable searches and seizures of the person. The Amendment begins by stating unequivocally that "[t]he right of the people to be secure in their *persons*, houses, papers and effects, against unreasonable searches and seizures shall not be violated. . . ." U.S. Constitution, amend. IV (emphasis added).

This case is about whether or not millions of people have to endure a violation of their rights just to drive a car. This case is about how much pressure the government can put on its people to obtain a waiver of their Fourth Amendment rights. And this case is about whether the search of a person's body should take place without judicial oversight.

It has long been the rule that a neutral and detached magistrate is essential in deciding whether or not the sanctity of a person's body can be breached by a government search. This Court stated this rule in

Schmerber v. California, 384 U.S. 757, 86 S. Ct. 1826 (1966). The Court wrote:

> The importance of informed, detached and deliberate determinations of the issue whether or not to invade another's body in search of evidence of guilt *is indisputable and great.*

Schmerber v. California, *supra*, 384 U.S. at 770 (internal citations omitted) (italics added).

The California DUI Lawyers Association asks this Court to reaffirm the importance of this *indisputable and great* principle.

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